Effect of Powerline Clearing on Trappers near Upper Lay Creek

Complaint Investigation 990192

FPB/IRC/40

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The Investigation

On May 11, 1999, the Board received a complaint from the BC Trappers Association on behalf of trappers on three registered traplines. During 1997 and 1998, Royal Oak Mines Inc. (the licensee)[1] constructed a powerline for the Kemess South Mine that intersected the complainants' trapping areas. The complainants claim that traps, trails, a trapping cabin, furbearer habitat, and their businesses were harmed by construction of the powerline. Further, the complaint emphasizes that the licensee:

- did not assess how the wildlife resource or the trapping businesses would be affected;
- did not attempt to consult with the registered trapline owners; and
- did not address the problem when the trappers contacted the licensee.

The complainants requested that the Board assist them in getting compensation for their losses. However, the Board has no authority to require either the licensee or government to pay compensation.

The Board's jurisdiction[2] includes investigating the preparation and approval of the three logging plans required for the clearing of the powerline right-of-way. There were no other operational plans required for the project.

The Board's investigation focused on the following three concerns:

1. Did the logging plans comply with wildlife/trapping requirements of the *Forest Practices Code of British Columbia Act* and related regulations (the Code)?
2. Was the district manager's decision to approve the logging plans reasonable?
3. Was the process used to identify concerns with the logging plans fair?

Background

The 380-kilometre powerline runs from the Kennedy sub-station at Williston Lake (south of Mackenzie), northwest to the Kemess South mine site near Thutade Lake in northeastern British Columbia (see map). The construction was a major project that involved clearing trees from the powerline right-of-way and resulted in the removal of approximately 300,000 cubic metres of timber, the equivalent of about 10,000 logging-truck loads.

Construction began early in 1997. During clearing, the licensee's logging crew discovered a trapping cabin on the powerline right-of-way and notified a mine inspector who monitored the

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1 Royal Oak Mines Inc., the licensee, went into receivership in 1998. As of February 2000, Northgate Explorations Ltd. operates the Kemess South Mine.

2 The Board has jurisdiction to investigate matters contained within parts 3 to 6 of the *Forest Practices Code of British Columbia Act*.

construction. The mine inspector instructed the licensee to keep machinery away from the cabin, and logging of the powerline continued.

All participants agreed that clearing the powerline corridor destroyed some trapline facilities, including trails, trap boxes and traps. They also agreed that clearing the powerline corridor altered the habitat of fur-bearing species that the trappers target.

A field review found that the powerline had exposed the trapping cabin to view from a forest service road and, subsequently, vandals had made the cabin unusable. Now that the cabin is visible it is no longer safe for storage, so repairing the cabin will not restore its function.

This report discusses many different maps. The following table is a useful reference.

Table of Maps

Map Type	Scale	Description
Power Line Referral	1:1,000,000	Sent from forestry consultant to trappers.
Licence of Occupation	1:1,000,000	Legal description of land tenure.
Exhibit A	1:70,000	Licence-to-Cut map showing the legal description of where timber can be cut.
Logging Plan	1:10,000	Shows information that is required by the Code.
Trapline Cabin Referral	1:50,000	Attached to referral letter showing the location of the trapping cabin.
Trapline	1:250,000	Ministry of Environment, Lands and Parks map showing the boundaries of trapping areas.
Ministry of Forests Management Atlas	No Scale	An electronic data base. The data represent the map feature positions and the precision of the location does not depend on scale.

Investigation Findings

1. Did the logging plans comply with the wildlife/trapping Code requirements?

Logging Plan Content

The Ministry of Forests authorized the logging of the powerline right-of-way under a timber tenure called a "licence-to-cut." Section 21 of the *Forest Practices Code of British Columbia Act* (the Act) required that the licensee prepare, and the district manager approve, a logging plan before the licensee could harvest timber under a licence-to-cut.

Section 33[3] of the *Operational Planning Regulation* had two wildlife content requirements for a logging plan. First, it stated that a person preparing a logging plan "must ensure that a logging plan contains a map of the area under the plan illustrating the location of ... wildlife habitat areas." Wildlife habitat areas are areas of land that are required for wildlife identified as being at risk. Section 70 of the *Operational Planning Regulation* prescribes the requirements for wildlife at risk and wildlife habitat areas. The government has not designated any wildlife habitat areas along the 380-kilometre powerline.

> Section 70 of the *Operational Planning Regulation* prescribes the requirements of a **wildlife habitat area** as follows:
>
> 70. (1) The Deputy Minister of Environment, Lands and Parks, or a person authorized by the Deputy Minister of Environment, and the chief forester, acting jointly, may, by written order,
>
> (a) classify a species at risk as identified wildlife, if they agree that the species needs to be managed through a higher level plan, wildlife habitat area or general wildlife measure,
>
> (b) establish a mapped area of land as a wildlife habitat area, if satisfied that the mapped area is necessary to meet the habitat requirements of identified wildlife

Section 33 of the *Operational Planning Regulation* also required that wildlife trees be identified in a silviculture prescription to be included in a logging plan. However, a silviculture prescription was not required for the powerline. There are no other wildlife- or trapping-related content requirements for logging plans. The Code does not require licensees to show traplines or trapping cabins on logging plans. Therefore, since there were no requirements for wildlife in the logging plans, the logging plans met the wildlife content requirements of the Code.

The entire mine project went through an environmental assessment under the BC *Environmental Assessment Act*. The environmental assessment identified some wildlife habitat values, and although not required to do so under the Code, the licensee incorporated these values in the logging plans.

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3 This requirement is currently section 32(a)(iv) of the *Operational Planning Regulation*.

Finding #1

Since government had not established wildlife habitat areas under the Code, and a silviculture prescription was not required, there was no requirement for the logging plans to show any wildlife-related information. Therefore, in the absence of any requirement, the logging plans complied with wildlife/trapping-related content requirements of the Code.

Public Consultation

The complainants assert that the licensee did not consult with them while planning construction of the powerline. They also assert that, even when the complainants contacted the licensee, the licensee did not address their concerns.

The logging plans did undergo two forms of public review: environmental assessment and referral of the powerline proposal.

Environmental Assessment

The proposed mine, including the powerline, required public review in the environmental assessment process. Although information from this public review assisted the licensee and government in planning the project, the exact powerline location was unknown because the location depended on the environmental assessment. The Kemess South project committee for the environmental assessment recommended project approval[4] in March 1996, but recognized that there was potential for environmental impacts from construction of the powerline. The committee proposed several mitigation strategies. One strategy required the proponent:

> to obtain cutting permits from MoF [Ministry of Forests] for timber harvesting along the proposed right of way. The process for obtaining such cutting permits makes allowance for public review and comment of the proponents' plans. The MoF require the proponent to prepare a logging plan and environmental management plan for this activity.[5]

The Kemess South project committee formed a mitigation strategy that depended on the approval process for cutting permits and logging plans to allow for public review and comment on the powerline. The Ministry of Forests had anticipated that the local forest industry would log the timber from the powerline following the normal forest development planning process. However, logging the powerline did not interest the local forest industry. Therefore, the Ministry of Forests decided to issue the mining company a licence-to-cut. The licence-to-cut did not require a cutting permit but it did require a logging plan.

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4 The final report, dated March 1996, is referenced in Project Approval Certificate M96-03.

5 Section 5.3.2 of the *Final Report; Kemess South Project Assessment Committee; March 13, 1996*. The report outlines the Kemess South Project Committee recommendations on the issuance of a project approval certificate and the reasons for those recommendations pursuant to the *Environmental Assessment Act, S.B.C. 1994*.

According to the *Logging Plan Guidebook*: "A logging plan is a block-specific plan that describes the harvesting actions to be carried out on a specified site. It must be consistent with the intent and prescribed standards laid out in the currently approved forest development plan and silviculture prescription for the area."[6] For normal timber tenures a logging proposal must be identified in a forest development plan before a logging plan is approved. The Code requires a forest development plan to undergo prescribed review and comment provisions. This allows those who are concerned about a particular forest resource to identify their concerns to the licensee. The licensee is required to consider the concerns and make appropriate changes to the forest development plan. The licensee is also required to present any written comments it receives in the review period to the district manager.

However, a licence-to-cut does not require a forest development plan. Therefore, the powerline clearing was not subject to the forest development plan review and comment requirements of the Code. Although the Kemess South project committee report included a mitigation strategy that depended on public review and comment, that report did not place a legal obligation on the district manager to require public review and comment. Furthermore, the committee report authorized the district manager to vary the recommendations of the committee report.

Finding #2

The Kemess South project committee mitigation strategy depended on, but did not require, an approval process for cutting permits to allow for review and comment on the powerline. However, a licence-to-cut or logging plan did not require any legislated public review and comment. Therefore, there was no public review and comment requirement for the powerline.

Referral of the powerline proposal

The second form of public review followed in the fall of 1996. Section 6 of the *Operational Planning Regulation*[7] allowed the district manager to require the licensee to make the plan available for review and comment; or to refer logging plans to parties specified by the district manager. The licensee would then be required to consider the comments, make changes to the logging plans that the licensee considered appropriate, and forward the comments to the district manager when submitting the logging plans for approval. The district manager considered whether or not to invoke these requirements. He suggested to the licensee that it take guidance from section 6 of the *Operational Planning Regulation* and voluntarily refer the powerline proposal to those who had an interest in the area. The licensee was willing to do a voluntary referral and, because the district manager thought there was urgency for approval of the powerline, he decided not to invoke section 6 of the *Operational Planning Regulation*.

6 *Logging Plan Guidebook*, 1995, page 1.

7 The requirements have since been changed but similar requirements are included in sections 7 and 36 of the *Operational Planning Regulation*.

As part of the referral process, the licensee engaged a consultant to contact trappers and guides who had licences on or near the proposed powerline. In 1996, Ministry of Environment, Lands and Parks policy did not allow the release of registered trappers' names, even to licensees.[8] The forestry consultant identified trappers from information gained from local timber licensees. Although not entirely current, this was the best information available to the forestry consultant. In September of 1996, the consultant sent registered letters to, or met in person with, all the trappers identified along the powerline right-of-way. He invited the trappers to contact him with their concerns, and he answered subsequent questions from the trappers. The forestry consultant contacted three trappers registered at the time on the three traplines identified in this complaint.[9]

The consultant gave trappers a package that explained the powerline proposal and included a powerline referral map at a scale of 1:1,000,000 and a diagram of a transmission tower. At this scale, a single line on the powerline referral map represented the powerline that was approximately 500 metres wide on the ground. The powerline referral map at this scale was adequate for illustrating the general location of the proposed powerline but was of little use for identifying the exact powerline location.

On September 19, 1996, the consultant met with the trapper who owned the cabin at upper Lay Creek. On November 5, 1996, the consultant sent a summary of comments he received about the project to the Ministry of Forests district manager. The consultant also told the district manager that he would send him any further information he received as part of the public review and comment process. The summary showed that the trapper who owned the cabin at upper Lay Creek had asked for copies of the maps showing a more detailed location of the powerline. However, at that time the trapper had not expressed any of the concerns described in the complaint.

The licensee's forestry consultant had informed the district manager of the results of the trappers' review before the trappers had fully responded. After reviewing more detailed maps sent by the forestry consultant, the cabin-owner discovered that the powerline was going to clear a portion of the trapline and expose the cabin to view from the road. On December 6, 1996, the trapper sent a letter to the forestry consultant and identified that the powerline was going to go over her cabin. She requested the name of a company representative who could address her concern. The forestry consultant supplied the trapper with the name of the licensee contact and forwarded her letter to the licensee. However, neither the consultant nor the licensee forwarded this information to the district manager.

On December 17, 1996, the forestry consultant applied to the Ministry of Forests for the licence-to-cut for the upper Lay Creek area. The consultant also submitted a logging plan that included a logging plan map for the area, with a small symbol and label marking the location of the cabin. However, the text of the logging plan did not mention the cabin or trapline conflicts. Other than the small notation on the logging plan map, neither the licensee nor the forestry consultant notified the government that the construction of the powerline would result in

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8 The ministry created that policy to protect trappers from anti-trapping activists. In 1999, MELP changed this policy to allow release of the names of trappers to licensees.

9 Several trappers may be registered on one trapline at the same time.

clearing part of the trapline and the area around the trapping cabin. The Ministry of Forests issued a licence-to-cut on February 21, 1997, and approved the logging plan for the upper Lay Creek area on February 24, 1997.

Finding #3

Although not required to do so under the Code, at the suggestion of the district manager, the licensee consulted with registered trappers along the proposed powerline. Except for a notation on the logging plan map, neither the licensee nor the forestry consultant notified government that the powerline would disturb the trapline or clear the area around the trapping cabin.

On April 7, 1997, the trapper sent a letter to the licensee, noting that the powerline clearing had made the trapping cabin unusable. On May 20, 1997, in a response to that letter, the licensee explained that it was investigating the trapper's concerns and requested more information. On June 16, 1997, the trapper responded to the licensee in a letter that contained the information requested and outlined what the trapper believed to be fair compensation. No further communication occurred between the trapper and the licensee. The licensee, Royal Oak Mines Inc., went into receivership in 1998. Northgate Explorations Ltd. took over operation of the Kemess South Mine in February 2000. On October 23, 2000, the new licensee notified the Board that it had consulted with the trapping cabin owners. The licensee and trappers now agree that the licensee will replace the cabin with a new one in a different location.

Finding #4

After the trapper contacted the licensee regarding compensation for the trapping cabin, the licensee started investigating the concerns, but did not negotiate compensation. The original licensee went into receivership in 1998. A new licensee now operates the mine and has agreed to replace the trapping cabin.

2. Was the district manager's decision to approve the logging plans reasonable?

Under section 41 of the Act, the district manager was required to make a discretionary decision. This section required the district manager to approve the logging plans if he was satisfied that they would adequately manage and conserve the forest resources of the area to which they applied. As part of that decision the Code required the district manager to consider the impact of the logging plan on trappers and their property. The standard the Board uses in evaluating discretionary decisions is not whether, in the Board's opinion, the decision was the best decision. Rather, the standard is:

> Was the decision consistent with sound forest practices, did it achieve the intent of the Forest Practices Code and was it based on an adequate assessment of available information?

What trapper-related information was available to the district manager? The investigation found that the district used three methods to identify conflicts with other interests, including trapping: government agency review; status check for conflicts in tenure on the powerline; and review and comment.

Government Agency Review

The licensee's forestry consultant referred the logging plans to the Ministry of Environment, Lands and Parks before submitting the logging plans to the Ministry of Forests for approval. The Ministry of Forests also reviewed the logging plans. Neither ministry noticed the trapping cabin during review of the logging plans. After reviewing the logging plan map, the Board concluded that the notation on the map is small and similar to other detail on the map. Unless a reviewer was specifically looking for the cabin, it would be easy to miss.

Status Check for Conflicts in Tenure on the Powerline

A trapper must register a trapline and trapping cabin with the regional office of the Ministry of Environment, Lands and Parks (MELP). Such registration does not protect the trapline or the area around a trapping cabin from logging. When a trapper registers a trapping cabin, MELP refers the location to the BC Assets and Lands Corporation[10] (BCAL) which then creates a notation of interest for the cabin site and refers that notation to Ministry of Forests. The Ministry of Forests places that notation on the Ministry of Forests Management Atlas map system that maintains an inventory of the land in British Columbia. The notation of interest confers no land rights to the trapper; however, it does notify the government that there is an interest in that location. Statusing is research carried out on maps and records that ensures an agreement issued under the *Forest Act* does not authorize an act of intrusion over an existing right or interest. Statusing is a common procedure that usually occurs prior to granting permits or agreements.

The trapper registered the cabin location with MELP in 1987. At that time, a drafting error placed the cabin approximately 250 metres north of its true location on the Lands Branch trapline cabin referral map. Lands Branch sent a copy of the trapline cabin referral map containing the incorrect location back to MELP who then mapped the location on the trapline maps. MELP sent an updated trapline map to the trapper. The trapline map was at such a small scale that the mapping error was not detectable by the trapper. In 1987, Lands Branch also sent a referral, including a trapline cabin referral map with the incorrect cabin location, to the Ministry of Forests.

Because of the incorrect location of the cabin on the trapline referral maps, neither BCAL nor the Ministry of Forests found a conflict between the powerline and the trapping cabin when checking the land status in 1996.

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10 In 1987, when the powerline was under development, BC Assets and Lands Corporation was Lands Branch of the Ministry of Environment, Lands and Parks.

Review and Comment

The powerline clearing was not subject to the Code's public review and comment provisions. However, at the suggestion of the district manager, the licensee did put the powerline proposal through a non-legislated form of public review and comment. The summary of the review process that the Ministry of Forests received in November 1996 did not indicate a concern about the powerline going over the trapping cabin.

Finding #5

The methods the district manager used to identify conflicts with other resource users did not indicate a conflict between the powerline and the trapping cabin. The district manager had no reason to believe that the powerline would affect the trapping cabin. Therefore, under the circumstances, the district manager's decision to approve the logging plan was reasonable.

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3. Was the process used to identify concerns with the logging plans fair?

The Board examined the fairness of the decision-making process. Fair process requires effective and efficient administration as well as consideration of the potential impact of a decision on those directly affected and on the general public. The following analysis examines the fairness to the trappers of the tenure status check process and of the referral process.

Check for conflicts in tenure on the powerline

Lands Branch checked the land status of the licence of occupation in May of 1996. The licence of occupation map, at a scale of 1:1,000,000, showed the general location of the powerline. At that time, the licensee did not know the exact location of the powerline, so the Lands Branch check did not identify a conflict with the trapping cabin.

The Ministry of Forests produced the licence-to-cut exhibit A map, at a scale of 1:70,000. They did a status check on the Exhibit A map, using the Ministry of Forests Management Atlas, and it indicated a conflict with the notation of interest for the 1987 Lands Branch referral for the trapping cabin. An inspection of the trapline referral map, at a scale of 1:50,000, attached to the 1987 BCAL referral indicated that there was no conflict.

District staff did not double-check the conflict by examining the logging plan map submitted in December 1996. Had it been checked, it would have shown the trapping cabin in the middle of the powerline. However, that status check was done too late. It was not completed until April 4, 1997, more than one month after the logging plan was approved. The licensee had cleared the powerline at the cabin site by April 7, 1997.

Referral

After the licensee's forestry consultant contacted the trapping cabin owner, the cabin owner sent a letter to the consultant in December 1996. The cabin owner explained that the powerline

would run over the cabin. The consultant had made a commitment to forward new information to the district manager. However, neither the forestry consultant nor the licensee notified the government that the trapping cabin was on the right-of-way. The process that the district manager was relying on to identify problems with the powerline clearing broke down at that point.

Referral to the trappers was not a legal requirement in this case. However, the district manager could have used section 6 of the *Operational Planning Regulation* to legally require referral of the logging plan. The district manager did not invoke that power to require referral. If the district manager had required referral under the Code, there would have been a definite time for the trappers to respond to the licensee. If the licensee had received a response within that period, the licensee would have been required to make the appropriate changes to the logging plan and forward the comment along with the changes to the district manager. If the district manager had exercised his discretion to create a rigorous legal referral, the trappers' concerns may have reached the district manager before the logging plan was approved.

The Board considered whether the process of identifying the trappers' concerns was fair, given that the informal process was ineffective. The consultant, as a professional, had made a firm commitment. In the circumstances, the Board is of the opinion that it was reasonable for the district manager to rely on that commitment and that the informal review and comment process was fair. Its implementation, however, was ineffective and failed to identify the trappers' interest in a timely fashion.

Finding #6

The referral process that the district manager accepted failed to identify the trappers' interest before the district manager made his decision. However, the omissions and errors in the process were outside the control of the district manager. The district manager used a fair process to identify concerns with the logging plans.

Conclusions

1. Did the logging plans comply with the wildlife/trapping related content requirements of the Code?

   In the absence of any Code requirement, the logging plan complied with wildlife/trapping-related content requirements of the Code.

2. Was the district manager's decision to approve the logging plans reasonable?

   The district manager did not know that there was a conflict between the trapping cabin and the powerline. Therefore, the district manager's decision to approve the logging plans was reasonable.

3. Was the process used to identify concerns with the logging plans fair?

Two errors outside the control of the district manager resulted in a breakdown of the process.

First, the informal referral process set up by the district manager broke down because the licensee's forestry consultant did not follow through on his commitment to report further information to the district manager. Although it was not required under the Code, the forestry consultant and the licensee should have informed the district manager of the conflict with the trapping cabin before submitting the logging plan for approval. Additionally, the district manager could have required review of the logging plans under section 6 of the *Operational Planning Regulation.* Then, if the trapper had responded within the review period, the licensee would have been required to submit the comment to the district manager.

Second, the trapping cabin was incorrectly located on the trapline cabin referral map.

Even though there were breakdowns in the process, the process the district manager used to get information about other interests in the area was fair.

4. The trapping cabin owners are satisfied with the agreement to replace the trapping cabin in a new location.

Legislative update

In 1998, the government repealed and replaced the *Operational Planning Regulation.* Currently, section 36 of the *Operational Planning Regulation* allows the district manager to require public review and comment for a logging plan.

However, the *Forest Statues Amendment Act, 2000* repealed sections 11 and 21 of the *Forest Practices Code of British Columbia Act.* When those changes are brought into force, the district manager will no longer be able to require that the licensee prepare a logging plan for a licence-to-cut, even on a project of this scale.

Commentary

The Board suggests that the BC Trappers Association advise trapping cabin owners to check that the *Ministry of Forests Management Atlas* identifies the correct locations of their registered cabins.

Recommendations

The Board recommends that the Ministry of Forests ensure that the elimination of logging plans for a licence-to-cut will be accompanied by assignment of clear accountability and adequate resources for establishing and enforcing measures to protect the environment.

The Board recommends that the Ministry of Forests ensure that the Code requires large-scale projects subject to the Code, and not requiring forest development plans, to undergo public review and comment process similar to that for forest development plans.

In accordance with section 186 of the *Forest Practices Code of British Columbia Act*, the Board requests that the Ministry of Forests notify it, by September 30, 2001, of steps taken to respond to these recommendations.

Location of Upper Lay Creek Complaint